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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO "BRIEF OF RESPONDENT IN OPPOSITION"

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Respondent, by asserting that "there are alternate routes to relief" (Resp. Br., p. 14), underscores the basic question—how can a regulated rate rest upon "final reviewable action" of an agency having exclusive, primary jurisdiction, and at the same point in time also rest upon conflicting, collateral determinations in

state or Federal "diversity" actions? As did the Court below, Respondent advances novel propositions: (1) that the legal rate in a regulated transaction is not controlled by agency action but can be fixed *retroactively* and *prospectively* by collateral reading of unfiled "private agreements" at "common law"; and (2) that "alternate routes" exist to establish the effective rate—*either* by agency action on a tendered rate followed by statutory review in Courts of Appeals and this Court, *or* by subsequent collateral litigation in a District Court "exercising" "diversity powers." Such interpretations are the cause of the widespread uncertainty as to legal status of the thousands of rates "accepted for filing" under Section 4, and of the increasing efforts of buyers and sellers to litigate disputes over rates outside of the framework of the Natural Gas Act.[1]

1. Respondent professes to believe that the only importance of the question here is its application to the legal status of state minimum price orders. This patently is too narrow a view. The importance of the question lies in the fact that the Eighth Circuit decision makes the Federal Power Commission a mere filing cabinet for natural gas rates and leaves Section 4 of the Act without any field within which to operate effectively. The question is whether or not parties may evade Commission supervision of rate schedules through contracts not filed with the Commission, abrogating the rates on file.

The question is not particular; it is universal. It applies to every rate on file with the Commission under

[1] *E.g., Socony Mobil Oil Company, Inc.* v. *Brooklyn Union Gas Company; The Ohio Oil Company* v. *Brooklyn Union Gas Company; Brooklyn Union Gas Company* v. *Transcontinental Gas Pipe Line Corporation*, 299 F. 2d 692 (5th Cir. 1962).

Section 4. If such contracts may be made and enforced outside of the provisions and procedures of the Act, then every rate now on file with the Commission under Section 4 may have lurking behind it, unfiled and unknown to the public, contracts which could supersede the rate publicly on file with the Commission.

The question, therefore, is clear, and universal to every rate on file under Section 4. The presence of the question was noted in *Pan American Petroleum Corp. v. Superior Court of the State of Delaware*, 366 U.S. 656 (1961), but not there answered as that decision did not go beyond the jurisdiction question. This Court stated (366 U.S. at 664):

> "We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy."

This Court there recognized the existence of the question as to whether or not rate filings provide the exclusive basis for charges or may be altered by private, unfiled, agreements.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), this Court answered the same question as to the Federal Power Act, an identical statute. The question is here squarely before this Court; no better vehicle for its presentation is apt to be found. The question involves the interpretation of sections which are at the heart of an important Federal regulatory act. It is a question potentially present in every natural gas rate on file with the Commission. It calls insistently for an answer in order that the vast uncertainty as to the status of all of these rates, and all rates hereafter filed under Section 4, may be removed.

2. Contrary to Respondent's implications, the Commission, at least prior to the Eighth Circuit's construction, rigorously enforced the exact cents per Mcf made effective by Commission action as the only effective rate. The Commission interprets the "filed rate" doctrine as applicable:

> "The policy decision enunciated by the Commission in Order No. 230 to require collection of increased rates is clearly in accord with the filed rate doctrine as announced by the Supreme Court in the *Montana-Dakota* case. The Court there held that the company 'can claim no rate as a legal right which is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.' And as the Fourth Circuit in an earlier opinion in *Hope Natural Gas Company* v. *FPC* clearly stated (134 F. 2d 287, 311):
>
> > 'When rates were filed with the Commission pursuant to Section 4 (e) of the Act they become the only lawful rates which the utility could charge or accept (citing cases).'
>
> "Furthermore, if independent producers were not required to collect increased rates made effective by motion, serious problems would confront not only pipeline purchasers of natural gas and, in turn, distribution company purchasers, but also the Commission itself in the administration of the Natural Gas Act." (footnote omitted).[2]

3. The Commission has always recognized the exact rate "accepted for filing" as controlling until changed to another figure by subsequent action under the Act—the reservation of "approval" meaning *only* that the Commission can later change the rate prospectively

[2] *Re Alfred C. Glassell, Jr., et al.*, 25 FPC 286, 287-288 (Feb. 25, 1961).

upon determining "justness and reasonableness." (See *Re Home Gas Company*, 2 FPC 402, 409 (1940); *City of Cleveland* v. *Hope Natural Gas Co.*, 3 FPC 150, 187 (1942); *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, 311 (4th Cir. 1943), rev'd., other grounds, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)). This has meant that the "accepted" rate is the only legal rate while Commission action of "acceptance" remains existent and outstanding. Thus, as to the 12 cents rate discussed in *Re Cities Service Gas Company*, 14 FPC 134 (cited at Resp. Br., p. 8), the Third Circuit noted that as long as such Commission action remained operative, this rate "accepted" for filing was the "only legal rate" and no other "rate could have been charged . . ." *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956). Here, Respondent, with the Eighth Circuit's approval, seeks to nullify such "accepted" and effective rates through the guise of collateral common law action without recourse to the agency.

4. A key to Respondent's error lies in Respondent's references to *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956), and to the holdings of the Tenth and Third Circuits (Resp. Br., pp. 8-9, 13-15). In *Mobile*, on timely review, this Court reversed Commission action, and *then* made reference to "restitution," citing *Baltimore & O. R. Co., et al.* v. *United States*, 279 U.S. 781 (1929), in which an order of the Interstate Commerce Commission was *first* set aside, and *thereafter* a right of "restitution" was recognized. (279 U.S. at 785). The Tenth and Third Circuits adhere to the same two-step procedure, holding that timely reversal of Commission action of accepting

a specific rate in cents-per-Mcf for filing *is* a condition precedent to any "recovery" of claimed "overpayments" even in collateral litigation (*Cf.* Resp. Br., pp. 13-14, and Petition, pp. 13-15). The holding of the Eighth Circuit is diametrically opposite regardless of the guises of "common law" and "contract price"—in the face of still outstanding Commission actions, a different rate is established and enforced retroactively and prospectively, even though Respondent *never* proceeded before the Commission or the Courts under Sections 19(a) and 19(b).

Respondent and others interpret the Eighth Circuit's opinion to mean that by casting an "action" in "contract," Commission action under Section 4 may be circumvented and an "alternative" method of establishing legal rates created. Petitioner, however, believes *Mobile* means that Commission action accepting a rate claimed to be in conflict with an existing contract may be set aside on *timely* review, and that the reference to "restitution" was not intended to open the doors of state and Federal District Courts to reach behind Commission orders which have not been so set aside on review under Section 19. See *Portsmouth Gas Co.* v. *Federal Power Commission*, 247 F. 2d 90 (D.C. Cir. 1957).[3] Re-

[3] All cases cited by Respondent reached the Courts in *timely* manner under Sections 19(a) and (b) for review of Commission action: *e.g.*, in this Court, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959). (See also the rate dispute in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960)); in the Tenth Circuit, *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958); in the Third Circuit, *Natural Gas Pipe Line Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958).

spondent overlooks the dilemma of all sellers faced with "common law" judgments on the one hand, and statutory duties, under pain of civil and criminal sanctions, to adhere to the effective rate under the Act, on the other.

5. Respondent avoids reference to the exact nature of Commission action under Section 4: (a) Staff review and summary of the filing, expressing the exact rate in cents-per-Mcf (R. 53); (b) formal meeting of the Commission and voting upon that specific rate in cents-per-Mcf, whether to suspend, reject, or accept it for filing and permit that rate to be effective (R. 53); (c) public notice of acceptance and effectiveness of the rate by posting such action in the public files as required by the Act (R. 54); (d) issuance of letter orders giving notice of such action (R. 54); and (e) opportunity to seek timely review under Sections 19(a) and (b). All Federal courts in Section 19(b) proceedings have held that any person in disagreement with the exact rate so made effective must proceed in timely manner under Section 19(b) or be bound by such rate not only under the Act, but also in collateral litigation. (Petition, p. 14). Respondent and others, however, now read the Eighth Circuit's opinion and *Pan American Petroleum Corporation v. Superior Court of the State of Delaware*, 366 U.S. 656 (1961), as creating a loophole permitting either lower or higher rates to be enforced in collateral litigation to which the Commission is a stranger.

6. Respondent seeks to convey the impression that Commission orders in its Docket No. R-168 blessed such collateral control of rates (Resp. Br., p. 12). Docket No. R-168 was initiated on April 28, 1958, to consider, *inter alia*, the legal questions of changing retroactively

then effective Kansas rates such as the 11 cents and 11.055 cents involved here. (23 Fed. Reg. 2973, May 2, 1958). After briefing and oral argument, the Commission terminated the proceeding *without* changing the legal, effective status of these rates under the Act. (27 Fed. Reg. 1368, Feb. 14, 1962). The Commission recognized a buyer could bring an action "in an appropriate court," but further recognized the existence of Federal defenses in such suits "other than defenses" based on a state order. (27 Fed. Reg. 2657, Mar. 21, 1962). The Commission also noted with respect to "exercise" of its "jurisdiction over the matters involved," "[s]uch matters can more conveniently be decided when properly raised in individual proceedings before us." (27 Fed. Reg. 1368, Feb. 14, 1962). In such matters, as recently as January 29, 1960, the Commission recognized continued, valid effectiveness of such an 11 cents rate. *Re Western Natural Gas Company*, 23 FPC 235 (1960).

7. Respondent seeks to limit the impact of the constructions below to disputes involving state orders, but such is not possible. Under the Act, rates may be "agreed-upon" initially by "contract," but a specific rate in cents-per-Mcf does not become the legal, effective rate except after Commission action on the tender. There are pending hundreds of disputes as to what rate should become effective because of differing interpretations of contract provisions. (See, *e.g.*, *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960).) The Eighth Circuit and others are interpreting the *Mobile* and *Pan American* decisions to mean that Commission actions upon such rates can be ignored, and the rates established retroactively and

prospectively in collateral suits outside Commission jurisdiction and statutory procedures.[4]

Petitioner submits that once a rate has been made effective under the Act by Commission action, it is that Federal rate—not a "state order" or "contract price"—which *thereafter* must control, and that antecedent or underlying disputes arising from contracts cannot control *unless* that Federal rate is first set aside by timely review of Commission action, as in *Mobile*, *Texas Gas*, and other cases. The Eighth Circuit's construction, however, leaves Petitioner, and every regulated natural-gas company, subject to collateral, conflicting judgments in every instance in which a buyer, landowner, processing plant operator, or royalty owner claims a "contract right" to pay or be paid on the basis of some figure different from the specific rate accepted for filing and effective by Commission action.

Petitioner, in its day-to-day operations cannot, at one and the same time, comply with the Natural Gas Act and Commission orders thereunder, and also with these conflicting judgments in collateral litigation. This Court once said that the Commission's jurisdiction cannot "vary with the rise and fall of the Susquehanna River."[5] The question here is whether its rate jurisdiction can rise and fall with "alternate" routes, depending upon how an "aggrieved buyer" chooses to

[4] A recent startling example is *Superior Oil Company* v. *El Paso Natural Gas Company*, No. 1457, 83rd Judicial District Court, State of Texas, which was initiated even though the Commission had instituted a proceeding to resolve the same dispute. Cf. *The Pure Oil Company* v. *Federal Power Commission*, No. 13,392, 8th Cir., decided February 26, 1962.

[5] *Pennsylvania Water & P. Co.* v. *Federal Power Commission*, 343 U.S. 414, 420 (1952).

cast a "suit" to set aside an effective rate. Either Commission actions control, or natural-gas companies are free to make "private agreements" and then enforce "contract" claims outside the reach of the Act.

For the foregoing reasons and those set forth in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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